WARREN HAVENS
2649 Benvenue Avenue, Berkeley CA 94704
510 914 0910 | wrrnvns (at) gmail (dot) com

Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

October 18, 2017

Attn: Linda Oliver	Attn: Jacob Lewis	Cc:
Assoc. General Counsel &	Assoc. General Counsel	David Senzel
Chief, Admin. Law Division	Litigation Division	(Admin Law, EB 11-71)
linda.oliver@fcc.gov	jacob.lewis@fcc.gov	david.senzel@fcc.gov

Dear Ms. Oliver, Mr. Lewis, and Mr. Senzel,

Re: EB Docket 11-71(the "Case," Closed), FCC 17M-35, and FCC 15M-14

My letter dated and emailed to you on October 10, 2017 (filed with the Secretary in hard copy the same day) was based on legal research. I present some of it here. [1]

Contents

Sincerely,

Warren Havens
(Contact information on the letterhead.)

[1] Please let me know if you find this to be a "presentation" under FCC Ex Parte rules, regarding proceeding 11-71 (or any other proceeding) and if so, the basis for that, and what action I should take - and I will promptly do that. Please see first your office's previously advice to me on this matter by Mr. Senzel. From the release of FCC 15M-14, and as shown in the certificate of service attached to FCC 17M-35, the ALJ, Richard Sippel, removed me from this Case, EB 11-71.[1] I do not agree that was lawful (and submitted objections), but it is a fact. In addition, FCC 17M-35 closed the 11-71 Case. Thus, I believe there are no persons I need to serve. If you believe otherwise, then please provide the basis, and if such other persons should have been serving me on written and oral presentations they made in this Case after FCC 15M-14, and if you will take action for any ex parte rule violations involved.

Memo

I.
Under FCC 17M-35, FCC 15M-14 is Moot,
And Has No Legal Effect, and No Action On It Can Be Taken

FCC 17M-14 states:

> Following the Commission's grant of relief for Maritime and Choctaw's Second Thursday request, FCC 16-172 (rel. Dec. 15, 2016), the Presiding Judge lifted the stay in this proceeding. Order, FCC 17-04 (rel. Feb. 14, 2017). The only remaining issue for resolution by the Presiding Judge was whether the 16 site—based facilities still at issue had been permanently discontinued.
> [….]
> Since the parties have jointly stipulated that none of 16 site-based facilities have been permanently discontinued, there are no further issues for decision. Accordingly, this case IS HEREBY DISMISSED. SO ORDERED.[2]

1. Because of this FCC 17M-35 Case dismissal Order, the underlying interlocutory Order 15M-15, pending on appeal, is moot and automatically dismissed, given that no exception applies. See: *Akina v. Hawaii*, 835 F.3d 1003 (9th Cir. 2016):

> The [federal] court…has no jurisdiction over an appeal that has become moot. *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). [….] An interlocutory appeal [and its underlying order or action]…is moot when a court can no longer grant any effective relief sought…. See *In Def. of Animals v. U.S. Dep't of Interior*, 648 F.3d 1012, 1013 (9th Cir. 2011) (per curiam); see generally *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669, 193 L. Ed. 2d 571 (2016).
> [….]
> We also conclude that the plaintiffs' appeal does not fall….[u]nder the voluntary cessation exception…. *Friends of the Earth*, 528 U.S. at 189 (citing *United States v. Concentrated Phosphate Exp. Ass'n,* 393 U.S. 199, 203… (1968))…. "…the challenged conduct cannot be reasonably expected to start up again." *Id.*

Applied to FCC 15M-14: (i) the 'court' -- here, the ALJ, has no remaining jurisdiction over 15M-14-- an interlocutory Order that only (and could only) referred matters of the 11-71 case (certain alleged conduct by me) to the Commission to decide on *"addition" of issues in the ongoing 11-71 Case—i.e., the matter rested with the ALJ* once the Commission decided on the referral (*see below*), and (ii) the "voluntary cessation" exception to mootness does not apply

[2] No copy was sent to Warren Havens, as shown in the attached certificate of service. I understand that is because 15M-14 removed me from the Case. The ALJ concluded that he had sole authority to remove me (after the full Commission made me a prosecuting party in the OSC/HDO that commenced this EB 11-71 Case, FCC 11-64) and notwithstanding the language in the rule he cited, §1.251(f)(3) to the contrary, as discussed below.

because the "challenged conduct" of Havens in 15M-14 cannot "be reasonably expected to start up again" because the ALJ dismissed and closed the entire remaining Case by FCC 17M-35.[3]

2. Further, in *Cohen v. Benefit Indus.,* 337 U.S. 54, the US Supreme Court held:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia v. Sweeny*, 1 Pet. 567, 569; *United States v. River Rouge Co.,* 269 U.S. 411, 414; *Cobbledick v. United States,* 309 U.S. 323, 328.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.

As the Supreme Court recognized in *Standard Oil v. United States*, 283 U.S. 163 (1931), the collateral order doctrine applies equally to review of administrative action under the Administrative Procedure Act. 101 S. Ct. at 496; see *Matthews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976); *Community Broadcasting, Inc. v. FCC*, 546 F.2d 1022, 1024-25 (D.C. Cir. 1976).

I assert that FCC 15M-14 is an interlocutory "collateral order" as discussed by the US Supreme Court in *Standard Oil v. United States,* 283 U.S. 163 (1931), defining a "collateral order doctrine" and holding that it applies equally to review of administrative action under the Administrative Procedure Act. 101 S. Ct. at 496; see Matthews v. Eldridge, 424 U.S. 319, 331 n.11 (1976); ***Community Broadcasting v. FCC***, 546 F.2d 1022, 1024-25 (D.C. Cir. 1976).

In this regard, the settlement of a civil suit-- including per *Standard Oil*, and *Community v FCC*, an FCC hearing case with a pending interlocutory order and appeal thereof -- here, the EB 11-71 Case settlement and resulting FCC 17M-35 Order dismissing and closing the Case, and the pending interlocutory Order FCC 15M-14 and my appeal thereof -- leaves no controversy for determination, so that it must be dismissed as moot. *Hammond Clock Co. v. Schiff,* 293 U. S. 529 (1934); *Dakota County v. Glidden*, 13 U. S. 222 (1885); *Gardner v. Goodyear Dental Vulcanite Co.,* 131 U. S. ciii (873); see *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 309 (1897).[4]

---

[3] Apart from the fact that the ALJ removed me from the Case proceeding by 15M-14 itself, which was impermissible as discussed below, but is not relevant to the conclusion above.

[4] The authorities and discussion (other than my tie-in to this FCC Case, between the double hyphens) in this paragraph are from: Sidney A. Diamond, "Federal Jurisdiction to Decide Moot Cases," University of Pennsylvania Law Review, Vol. 94, No. 2, 1946. This article also includes:

> A statute which purports to confer jurisdiction to decide a moot case is unconstitutional. *California v. San Pablo & T. R. R.,* 149 U. S. 308 (893) (tax paid under stipulation); *San Mateo County v. Southern Pacific R. R.*. 116 U. S. 138 (1885) (similar facts)…. "[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or … a judgment upon some matter which,

3 In addition: In this proceeding EB 11-71, the Commission decided in its MO&O, FCC 14-149, rel. Oct. 14, 2017 (underlining added)[5]:

> 1. By this memorandum opinion and order, we dismiss the "Appeal under Rule § 1.301(a)," filed January 28, 2014 (as corrected), by Warren Havens (Appeal). Havens seeks interlocutory review of a procedural ruling (14M-3) by Chief Administrative Law Judge Richard L. Sippel (ALJ) that rejected Havens' claim of attorney-client privilege at a prehearing conference.1/ We find that a subsequent ruling by the ALJ has mooted appeal of the attorney-client privilege question.2/ We also dismiss six other interlocutory appeals that Havens has filed concerning the same proceeding.
>
> ---
>
> 1/ See Order, FCC 14M-3 (Jan. 17, 2014) (14M-3). Various parties filed oppositions or responses to Havens' Appeal.… Choctaw's pleading is beyond the scope of its authorized participation, and we grant Havens' motion to strike it. See infra para. 15.
>
> 2/ See Memorandum Opinion and Order, FCC 14M-18 (Jun. 17, 2014) (14M-18).

Regarding the Commission's holdings in FCC 14-149, above, applied to FCC 15M-14 and FCC 17M-35: When the ALJ made the "subsequent ruling" by FCC 17M-35, it "mooted" the related interlocutory appeal of underlying "ruling," FCC 15M-14.

Both 14M-3 (subject of the Commission's FCC 14-149) and FCC 15M-14 are ALJ rulings in the classes under §1.301(a) providing a right of interlocutory appeal. Thus, 17M-35 which terminated and closed the entire Case, including its component FCC 15M-14 and my appeal thereof which are thus mooted.

Regarding my provisional intent to seek court relief noted in my October 10 letter to you (referenced on page 1 above), I discuss below FCC 14M-149 and US Supreme Court and other federal court decisions, to show in part the extreme prejudice caused to me, compelling either grant of this Request or court action. From 14M-149:

> 13. 14M-22 does not fall within the categories of rulings that would be appealable as a matter of right, which categories include rulings that "den[y] or terminate[] the right of any person to participate as a party to a hearing proceeding,"38/ or that "remove counsel from [a] hearing."39/….

---

when rendered, for any reason, cannot have any practical effect upon a[ny] then existing controversy." *Ex parte Steele,* 162 Fed. 694, 7o1 (N. D. Ala. 1908).

[5] The ALJ decisions subject of FCC 14-149, discussed above, did not remove me from the EB 11-71 proceeding, nor did it pose a charge under §1.251(f) as modified improperly by the ALJ (that is a summary-judgment-related procedural-control rule, not a licensing rule, as the Commission explained when adopting it. §1.251(f), the rule cited in 15M-14 as the basis of the character qualification issue, is only about qualifications of a party to be "added" to the ongoing hearing in which an alleged improper motion for summary decision is submitted: Under this rule, the most that could happen, besides possibly monetary fines, is that the party is removed, if the Commission found the "referred" "facts warrant" the addition of that issue But 15M-14 did that - without waiting for the Commission to decide under a §1.301(a) interlocutory appeal, or under this §1.251(f)(3) "he will certify the matter to the Commission… for a determination."

> 14. Appeal of 14M-25….We find that the order in question, 14M-25, which merely imposes conditions on how Havens, as a party, must conduct himself, does not terminate his party status. It therefore does not "effectively" deny Havens' right to participate as a party.[ ] We dismiss his interlocutory appeal,
> ---
> 38/ 47 C.F.R. § 1.301(a)(1).
> 39/ Id. § 1.301(a)(5).

The point of the above is that the Commission, reasonably promptly-- (but still slow for an interlocutory appeal that had to be filed within 5 days, the decision on which would affect the proceeding)-- after several months, decided on the ALJ decisions under §1.301(a), and on others dismissed that were deemed not under §1.301.[6] But in the order-of-magnitude more serious and damaging ALJ 15M-14, the Commission has sat on interlocutory appeal ***for over two years already***. "Justice delayed is justice denied" -- and there can be few more extreme cases that fit that maxim, as this one. Thus, I intend to seek court relief if needed, as indicated on page 1.

Further on this point, the US Supreme Court held in *Cohen v. Benefit*, 337 U.S. 541:

> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia v. Sweeny*, 1 Pet. 567, 569; *United States v. River Rouge Co.*, 269 U.S. 411, 414; *Cobbledick v. United States*, 309 U.S. 323, 328.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it.
> [….]

The interlocutory Order FCC 15M-15, and my appeal thereof under FCC rule §1.301(a) providing a right of appeal is consistent with *Cohen*. But the FCC has violated *Cohen* and the purpose of §1.301(a) by sitting on the appeal for 2 years— to the end of the case where the decision I was entitled to moot.

These violations of *Cohen* and FCC rule §1.301(a) are not directly relevant to grant of this relief under this Request under the main arguments above, but they underscore a further reason for relief grant: due to the egregiously delayed time and prejudice caused. See also my Notice of Appeal of FCC 17M-35 and the accompanying initial memo filed in EB 11-71 on October 6, 2017, a courtesy copy of which was emailed by me to David Senzel of your OGC.

Further on this point: The Supreme Court recognized in *Standard Oil v. United States,* 283 U.S. 163 (1931), that collateral order doctrine, under *Choen* (above), *applies equally to*

---

[6] Under the Commission's interpretation of the facts, which had substantial errors. However, I cite to the above for the law stated, for which those factual the errors do not count for purposes of this letter.

review of administrative action under the Administrative Procedure Act. 101 S. Ct. at 496; see Matthews v. Eldridge, 424 U.S. 319, 331 n.11 (1976); ***Community Broadcasting v. FCC***, 546 F.2d 1022, 1024-25 (D.C. Cir. 1976).

From ***Community v FCC*** (above) (footnotes in original deleted, underlining added):

> Pursuant to 28 U.S.C. § 2342(1) (1970) federal Courts of Appeals possess exclusive jurisdiction to review "final orders of the Federal Communications Commission * * *." The finality requirement of Section 2342(1) is the counterpart to that of 28 U.S.C. § 1291 (1970) which governs appeals from final orders of federal District Courts. Both provisions reflect the reasoned policy judgment that the judicial and administrative processes should proceed with a minimum of interruption. 3/ To effectuate this common purpose, courts have permitted interlocutory appeals under both statutes only in exceptional cases, 4/ a requirement that partakes of similar meanings in both contexts. 5/ In analyzing whether to allow an appeal from the agency's order in the present case, therefore, we can freely look to decisions involving appeals from District Court orders denying motions to disqualify counsel.
>
> […..]
>
> In order to ameliorate the harshness of the finality requirement of Section 1291, the Supreme Court fashioned, in *Cohen v. Beneficial Industrial Loan Corp*., 337 U.S. 541, 546-547, 69 S. Ct. 1221, 1226, 93 L. Ed. 1528 (1949), a "collateral order" exception to the finality rule. The Cohen exception allows immediate appeals from certain orders that do not fully and finally terminate the litigation between the parties. 6/ The Supreme Court outlined several prerequisites to appeal from an interlocutory order. First, the order must be a final determination of a claim of right "separable from, and collateral to," the rights asserted in the main action. 7/ Second, the order must present "a serious and unsettled question," rendering it "too important to be denied review." 8/ Finally, an immediate appeal must be necessary to preserve rights that would otherwise be lost on review from final judgment. 9/ In conclusion the Court in *Cohen* emphasized that the finality requirement should be given "practical rather than a technical construction." 10/

FCC 17M-35 is in legal effect, even in the case here, where I timely filed a Notice of Appeal (but not yet the actual Appeal): I filed the Notice on October 6, 2017, and emailed a courtesy copy to David Senzel of your OGC office. Under the rationale and holdings in *Community Broadcasting v FCC* and *Cohen*, I allege a second, compelling reason for relief requested in this letter, or if not granted, to proceed with an action for relief in a federal court for relief from FCC 15M-14.

II.
FCC 15M-14 Is Void for Due Process Violation

As Found by the US Supreme Court in *FCC v. Fox TV Stations, Inc*. 567 U.S. 239 (2012).

FCC v Fox dealt with violation of "Notice" requirement of Due Process. In my case of FCC 15M-14, I was not afforded required Due Process "Notice and Hearing":

(i) I was deprived of Due Process-required "Notice" as explained in *FCC v Fox*, below, because on the alleged "character qualification" breaches there were no Notices. A Due Process Notice has to be clear as to the charges, the basis of the charges, the rule or order alleged to be violated. This is noting pointed to in 15M-14 (or even in the entire preceding 11-71 proceeding) that even remotely approached such a Notice.[7] If one suggested that the charge in 15M-14 of an unauthorized motion for summary decision was subject to a fair Notice, as 15M-14 does state, that is not a Due Process Notice because

(a) it is a factual error, shown in my 15M-14 appeal pleadings, and

(b) it would be contrary to the FCC rule that *allows* a party to file a motion for summary decision, as the ALJ recognized in the proceeding error (also shown in my appeal and reconsideration pleadings). An ALJ cannot order that a right in a FCC rule is barred: any notice of that is unlawful, and is not a Due Process Notice.

(ii) I was deprived of Due Process-required "Hearing" because:

(a) No such Hearing is possible unless there is first the required Notice, and no such Notice was given (see above), and

(b) *There was no hearing at all*: if one considers the interlocutory appeal pleadings as counting toward a "Hearing" (which they do not, under '(a)') there was no decision by the Commission which, if it accepted the ALJ recommendation in FCC 15M-14 would have resulted in the "addition" of the character issue in the ongoing EB 11-71 proceeding for the ALH to then have a hearing on the charges in FCC 15M-14: but the Commission never did rule on these matters or otherwise instruct the ALJ to hold a hearing on said charges, and now, the ALJ has terminated the proceeding by FCC 17M-35.

Regarding this deprivation of Due Process required Notice: From *FCC v. Fox* (underlining an items in *double* brackets added),

> A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. See *Connally v. General Constr. Co.,* 269 U. S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law"); *Papachristou v. Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids' " (quoting *Lanzetta v. New Jersey*, 306 U. S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 888 (1939) ;(alteration in original)). This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment. See *United States v.Williams*, 553 U. S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008). It requires the invalidation of laws that

[7] Including the ALJ alleged notice to attorney Jim Stenger not to file a motion for summary decision when (i) the rule allowed this, and (ii) the ALJ discussed and permitted this at a prehearing conference, as shown in the transcript (as explained in my interlocutory appeal).

> are impermissibly vague. A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Ibid*. As this Court has explained, a regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved. See id., at 306, 128 S. Ct. 1830, 170 L. Ed. 2d 650.

The discrimination is my case is beyond "encouag[ing] seriously discriminatory enforcement". For details, I refer to my existing pleadings on this topic. The issue in this memo section does not rest on the details.

> Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is [[lawfully]] required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. See *Grayned v. City of Rockford,* 408 U. S. 104, 108-109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.
>
> [. . . .]
>
> Just as in the First Amendment context, the due process protection against vague regulations "does not leave [regulated parties] . . . at the mercy of noblesse oblige." *United States v. Stevens*, 559 U.S. 460, 480, 130 S. Ct. 1577, 1591, 176 L. Ed. 2d 435, 451 (2010).
>
> [. . . .]
>
> In addition, when combined with the legal consequence described above, reputational injury provides further reason for granting relief to Fox. Cf. *Paul v. Davis,* 424 U. S. 693, 708-709, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (explaining that an "alteration of legal status . . . combined with the injury resulting from the defamation" justifies the invocation of procedural safeguards). As respondent CBS points out, findings of wrongdoing can result in harm to a broadcaster's "reputation with viewers and advertisers." Brief for Respondent CBS Television Network Affiliates Assn. et al. 17. This observation is hardly surprising given that the challenged orders, which are contained in the permanent Commission record, describe in strongly disapproving terms the indecent material broadcast by Fox, see, e.g., 21 FCC Rcd., at 13310-13311, P30 (noting the "explicit, graphic, vulgar, and shocking nature of Ms. Richie's comments"), and Fox's efforts to protect children from being exposed to it, see id., at 13311, P33 (finding Fox had failed to exercise " 'reasonable judgment, responsibility, and sensitivity to the public's needs and tastes to avoid [a] patently offensive broadcas[t]' "). Commission sanctions on broadcasters for indecent material are widely publicized. See, e.g., *FCC. Fines Fox, N. Y. Times*, Feb. 26, 2008, p. E2; F. C. C. Plans Record Fine for CBS, Washington Post, Sept. 24, 2004, p. E1. The challenged orders could have an adverse impact on Fox's reputation that audiences and advertisers alike are entitled to take into account.